MASTER

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Stephen Arian, Esq. concerning the Board of Examiners in Veterinary Medicine's policy statement that the practice of veterinary medicine, surgery and dentistry includes the cleaning of animals' teeth [1]	1989 OAL Determination No. 12 [Docket No. 88-015] July 25, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 1

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Board of Examiners in Veterinary Medicine's policy statement that the practice of veterinary medicine, surgery and dentistry includes the cleaning of animals' teeth is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

Though expressing no opinion as to whether the above noted policy statement is wise or unwise, the Office of Administrative Law concludes that it is nonetheless a "regulation" and is subject to the requirements of the APA.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether the Board of Examiners in Veterinary Medicine's ("Board") policy statement that the practice of veterinary medicine, surgery and dentistry includes the cleaning of animals' teeth is (1) subject to the requirements of the Administrative Procedure Act ("APA"), (2) a "regulation" as defined in Government Code section 11342, subdivision (b), and (3) therefore violates Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

OAL concludes that the policy statement (1) is subject to the requirements of the APA,[9] (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The Board of Examiners in Veterinary Medicine was established in the Department of Professional and Vocational Standards in 1938.[10,11] In 1972, the Department of Consumer Affairs replaced the Department of Professional and Vocational Standards.[12]

The Board is responsible for issuing licenses to practice veterinary medicine,[13] inspecting the premises in which veterinary medicine, dentistry or surgery is being practiced[14] and enforcing cleanliness and sanitary requirements established by the Board.[15] The Board also has the power to revoke or suspend the license of any person to practice veterinary medicine, for cause, after notice and hearing.[16]

Additionally, Business and Professions Code section 4831 states:

> "Any person, who violates . . . any provision of [chapter 11, titled "Veterinary Medicine,"] is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars ($500), nor more than two thousand dollars ($2000), or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both such fine and imprisonment."

Authority [17]

Business and Professions Code section 4808 provides:

> "The board may in accordance with the provisions of the [APA], adopt, amend, or repeal such rules and regulations as are reasonably necessary to carry into effect the provisions of [chapter 11, titled 'Veterinary Medicine']. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

As noted above, section 4808 of the Business and Professions Code specifically provides that "The board may in accordance with the provisions of the [APA] adopt, amend, or repeal such rules and regulations as are reasonably necessary to carry into effect the provisions of [chapter 11, titled 'Veterinary Medicine.'] . . . " (Emphasis added.)

Additionally, the APA generally applies to all state agencies, except those "in the judicial or legislative departments."[18] Since the Board is in neither the judicial nor

the legislative branch of state government, APA rulemaking requirements generally apply to the Board.[19]

Background

The following undisputed facts and circumstances have given rise to the present Determination. The description of the procedure for cleaning animals' teeth was derived from the several hundred veterinarian comments received by OAL.

There appears to be a sharp division of opinion between the groomer community and the veterinary community concerning whether or not groomers should be permitted to perform "cosmetic" cleanings of animals' teeth. The groomers say "yes," contending that pet owners need to have the option of low cost cosmetic teeth cleaning. The veterinarians say "no," contending that teeth cleaning is inherently a preventive medical procedure, which can result in adverse health consequences if not done by fully qualified medical personnel in accordance with medical standards.

Business and Professions Code section 4826 defines veterinary "practice" as

> "Any person practices veterinary medicine, surgery, and dentistry, and the various branches thereof, when he [sic] does any one of the following:
>
> (a) Represents himself [sic] as engaged in the practice of veterinary medicine, veterinary surgery, or veterinary dentistry in any of its branches.
>
> (b) Diagnoses or prescribes a drug, medicine, appliance or application or treatment of whatever nature for the prevention, cure or relief of a wound, fracture, or bodily injury or disease of animals.
>
> (c) Administers a drug, medicine, appliance or application or treatment of whatever nature for the prevention, cure or relief of a wound, fracture, or bodily injury or disease of animals, except where . . . administered by an animal health technician or an unregistered assistant at the direction of and under the direct supervision of a licensed veterinarian . . . . However, no person, other than a licensed veterinarian, may induce anesthesia unless authorized by regulation of the board.
>
> (d) Performs a surgical or dental operation upon an animal.
>
> . . . ." [Emphasis added.]

Periodontal disease is described as a slow progressive inflammation and infection of the support apparatus of the tooth. Periodontal disease begins with the accumulation of plaque, which is a thin film that adheres to the tooth and is largely comprised of bacteria. As time passes, this plaque becomes mineralized to form tartar. Since this whole mass contains bacteria, bacteria are shed under the gumline when the tartar is removed. The bacteria can then infiltrate the tissues and blood system, unless removal under the gumline is performed at the same time.

The "scaling" of animals' teeth (the removal of tartar or calculus on the visible part of the tooth above the gumline or supragingival) is only one step in the process of dental care for the animal. "Curettage" or the removal of tartar or calculus below the gumline (subgingival) is also necessary. Though dental prophylaxis--a procedure designed to prevent dental disease--requires both supragingival and subgingival cleaning, subgingival curettage is deemed the primary and most important part of teeth cleaning in order to prevent the occurrence of periodontal disease.

Veterinarians generally claim that it is very unusual for any dog or cat to tolerate dental prophylaxis under the gumline without sedation or anesthesia. Additionally, unless the teeth (above and below the gumline) are polished with a proper rotating rubber polishing cup and prophypaste (a coarse paste), new plaque deposits develop more rapidly than usual, due to the rough surfaces left behind. It is also recommended that a posttreatment antibiotic regimen be continued for five to seven days.

On the other hand, groomers generally claim that it is not necessary to sedate or anesthetize a dog or cat in order to perform "cosmetic" teeth cleaning. In fact, their customers do not want their pets anesthetized merely to have the pet's teeth cleaned due to the risk of their pet dying while under anesthesia.[20]

Background: This Request for Determination

In a letter dated September 25, 1987, addressed to Patti Alexander, a pet groomer and owner of the Pampered Pooch in Stockton, California, the Board issued the following policy statement defining "teeth cleaning" (the challenged rule in this determination proceeding):

> "Teeth cleaning of animals is a preventive dental procedure, including but not limited to, the removal of explorer-detectable calculus, soft deposits, plaque, stains and the smoothing of unattached tooth services. These procedures are not exclusively cosmetic in nature. Their objective is the creation of an environment in

> which hard and soft tissues of the animal can be maintained in good health, preventing tooth and gum disease.
>
> "Such preventive dental procedures fall squarely within the parameters of Business and Professions Code Section 4826 on several grounds. Such procedures constitute a 'treatment of whatever nature for the prevention . . . of . . . disease of animals' pursuant to subsection (b) as well as 'dental operation upon an animal' pursuant to subsection (d). Additionally, the representation by an individual that he or she is engaged in such preventive dental procedures would violate subsection (a)." [Emphasis added.]

This policy statement was also contained in three other letters issued by the Board.[21]

In January of 1988, according to the Requester, "the Board caused the Department of Consumer Affairs, Division of Investigation, to conduct an undercover operation of Patti Alexander relying on the written statement defining teeth cleaning [contained in the above letter]. This undercover operation resulted in the issuance of a criminal citation. The San Joaquin County District Attorney refused to file charges on behalf on the Board."[22]

On February 11, 1988, Ms. Alexander filed a suit in San Joaquin County Superior Court of California, seeking damages for unfair competition, declaratory relief, and preliminary and permanent injunctions.[23] On May 3, 1988, the superior court judge issued the following preliminary injunction:

> "IT IS HEREBY ORDERED that the preliminary injunction issue prohibiting Plaintiff [Ms. Alexander] from using the cavitron device [an ultrasonic dental scaler] to clean animals' teeth. The Court is not prohibiting manual scaling devices as long as those devices are not used between the gum and tooth areas. The Plaintiff is to inform the customers that the surface of the teeth under the gums were not cleaned.
>
> "Plaintiff is entitled to use toothbrushes, gauze sponges, cotton swabs and dentifrices in cleaning animals' teeth. It is recommended that the Board of Examiners and [sic] Veterinary Medicine establish procedures and training for veterinary dental hygenists [sic]."

On March 25, 1988, before the court issued the above order, the Board published in the California Regulatory Notice Register[24] a notice of the following proposed adoption of Title 16, CCR, section 2037:

"2037. Dental operation; defined

"The term 'dental operation' as used in Business Professions Code Section 4826 means:

(a) (1) The application or use of any instrument or device to any portion of an animal's tooth, gum or any related tissue for the prevention, cure or relief of any wound, fracture, injury, disease or other condition of an animal's tooth, gum or related tissue; and

(2) Preventive dental procedures including, but not limited to, the removal of calculus, soft deposits, plaque, stains or the smoothing, filing or polishing of tooth surfaces.

(b) Nothing in this regulation shall prohibit, however, any person from utilizing cotton swabs, gauze, dental floss, dentifrice, toothbrushes or similar items to clean an animal's teeth."[25]

On or about September 1, 1988, OAL received a Request for Determination, from Stephen Arian, Esq. (the "Requester"), challenging the policy statement contained in (1) the letter addressed to Patti Alexander, dated September 25, 1987 (quoted above), and (2) the three other letters attached as exhibits to the Request which contain the same challenged policy statement.[26] The Requester alleges that

"The Board is using a detailed written statement defining animal 'teeth cleaning' as the practice of veterinary medicine to interpret and make specific Business & Professions Code Section 4826. That statute contains the definition of veterinary medicine but does not provide a definition of 'dentistry,' 'dental operation,' or 'teeth cleaning.'"

The Requester further argues that the statement is also a "rule of general application," and therefore must comply with the requirements of the APA.

On February 22, 1989, after going through the process of notice and the public comment period in regards to the adoption of the proposed regulation, the Board submitted the proposed adoption of Title 16, CCR, section 2037 to the Director of the Department of Consumer Affairs ("Department") for approval before submitting the rulemaking package to OAL. The Director of the Department, however, vetoed the proposed regulation pursuant to his statutory authority,[27] thereby halting the rulemaking process. In a letter to the Chairman of the Board, dated March 22, 1989, the Director stated:

"I believe that the adoption of this regulation is not in the best interests of the public of California. I

understand the fundamental differences between the position of the 'groomers' and that of the board. The rulemaking file clearly evidences the positions of the parties. I believe that the adoption of this regulation will operate to preclude the public from being able to obtain a legitimate service at an affordable cost. As evidenced by my comments herein, I do not believe that the public welfare is served by the adoption of this regulation.

"From all of the information that I have reviewed, it seems quite clear that the motivation is, at least in part, a matter of economics. If the safety of the public were truly the ultimate measure, the rulemaking file itself contains a number of alternative approaches to the 'problem' which are far more in keeping with the policies of this Administration."[28]

We note that one of the public comments submitted in this determination proceeding stated that "Approximately 700 letters of support were received by the Board of Examiners in regard to the above regulation [section 2037]; however, more that 2,700 were received in opposition to the regulation."[29] Another commenter observed, in regards to the 2,700 letters opposing the regulation, that the Director was persuaded by "the arguments of pet groomers armed with petitions from their clients favoring low-cost cosmetic teeth cleaning."[30]

On April 28, 1989, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[31]

By the end of the public comment period on May 30, 1989, more than 300 statements from veterinarians (95% of the comments) and animal health technicians were received by OAL, all supporting the Board's policy statement. No comments were submitted by the groomers. In summary, the commenters made the following points:

1. It is virtually impossible to completely treat all aspects of a pet's teeth and gumline without sedation and/or anesthesia, which a groomer is legally prohibited from using.

2. The public will be misled into believing that a "thorough" cleaning and polishing by a groomer will be more than merely superficial and cosmetic; teeth cleaning by a groomer gives clients false security that their pet's dental needs are taken care of and therefore will not seek proper care from and consultation with their veterinarian.

3. Dentistry in animals, like dentistry in people, is a complicated subject requiring thorough knowledge

of the anatomy and pathology of the mouth and the necessary surgical skill to treat lesions of the mouth. Pet groomers who clean animals' teeth are only doing a cosmetic job, at best, and could do unknowing harm.

4. Removal of superficial tartar is only one of the steps needed to clean teeth. A subgingival curettage, application of a bacteriostatic agent, thorough polishing and examination of the teeth and oral cavity are needed to complete the process; an evaluation of the health of the gums, including looking for the presence of oral tumors, infections and abscessed teeth, is a procedure a groomer is incapable of performing.

5. That groomers choose to see medical procedures as cosmetic ones does not change the fundamental medical purpose for which scaling is performed, namely the treatment of gingivitis and the prevention of periodontal disease.

6. The argument that it is less expensive to have a pet's teeth cleaned by a groomer is just not true--groomers recommend teeth cleaning once every four to six weeks, charging $15 to $45 per cleaning; whereas, a veterinarian recommends teeth cleaning once a year at the cost of $50 to $100. If a person is not qualified to do the job, the fee charged by that person is irrelevant. The comparison above does not include the additional expense of taking the pet to the veterinarian for treatment because of the harm done by the groomer when cleaning the animal's teeth or the client's belief that all of their pet's dental needs are taken care of by the groomer.

7. In human dentistry, there are no unlicensed individuals performing cosmetic procedures on patient's teeth.

OAL received the Board's Response to the Request for Determination on June 12, 1989.[32] In summary, the Board argues that the challenged rule:

1. Is not a rule of general application because (a) it is merely an exercise of the Board's adjudicatory power of applying the law to the facts of a particular case, on a case by case basis in response to a particular set of facts, and (b) the written statement was used on a limited basis--it was issued to only three individuals.

2. Restates existing law--the terms "dentistry" or "dental operation" have been sufficiently defined by the Legislature or courts--and therefore, does not implement, interpret or make specific the law administered or enforced by the Board.

3. In the event the challenged rule is found to be a "regulation" by OAL, the challenged rule falls within an established exception to the APA [33]

The arguments made by the Board will be addressed below.

II. DISPOSITIVE ISSUES

There are two main issues before us:[34]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

The Board argues that the challenged rule is not a rule of general application because the Board is merely exercising its adjudicatory power of applying the law to the facts of a particular case, i.e., on a case by case basis in response to a particular set of facts; and that the statement was issued to only three individuals.

We do not agree with this argument by the Board. For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.[35] The fact that the Board issued the statement to only three people does not lessen the effect or application of the rule on all members of the class, e.g. all non-veterinarians statewide who clean animals' teeth, except those permitted by Business and Professions Code section 4826[36] or exempt pursuant to section 4827. Such class members would be significantly effected in that they may be found in violation of section 4826 and therefore guilty of a misdemeanor, pursuant to section 4831, punishable "by a fine of not less than five hundred dollars, nor more than two thousand dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both such fine and imprisonment." It also seems unlikely that the Board would find that teeth cleaning falls within the parameters of section 4826 in one case and then find the opposite in another case.

Additionally, evidence that the Board has issued this policy statement, either written or orally, to more than three people appears in the Request for Determination, Exhibit D--the earliest dated letter containing the challenged statement. Exhibit D is the June 30, 1987 letter addressed to Jesse Blattel, Esq., who, in representing his client, requested a

"clarification of whether the cleaning of an animal's teeth 'by a non-veterinarian for profit is a violation of the Veterinarian Practice Act.'" The Board responded, in addition to using the same language as the challenged rule, that "This Board has consistently held that the type of preventive dental procedures described above ("Tooth cleaning of animals is a preventive dental procedure . . . ."] fall squarely within the Practice Act and may only be performed by the individuals and under the conditions described above. . . ."[37] The Board's letter further stated: "This office has not hesitated in the past to inform those who have made inquiries on this matter of the Board's position."[38]

We therefore conclude that even though the policy statement may have been issued to a limited number of persons who have made an inquiry, or who have come to the attention of the Board as possible violators of section 4826, does not lessen the fact that the challenged statement significantly affects all non-veterinarians statewide, who clean animals' teeth or who may clean animals' teeth in the future.[39]

We also reject the Board's contention that it is merely exercising its adjudicatory power on a case by case basis. The California Supreme Court stated in Pacific Legal Foundation v. California Coastal Commission:[40]

> "The action under consideration--adoption of guidelines interpreting the Coastal Act's access provisions--unquestionably falls within the category of quasi-legislative agency action, as opposed to quasi-judicial or adjudicatory proceedings. The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case."[41]

Following the court's definition of "quasi-legislative," we find that the challenged policy statement in this proceeding is also a formulation of a general policy intended to govern future incidents of non-veterinarians who clean animals' teeth. The policy statement would also be issued as a response to those who inquire whether non-veterinarians may clean animals' teeth.[42]

We therefore conclude that the challenged policy statement is a rule of general application.

The answer to the second part of the inquiry is also "yes." The challenged policy statement reads in part:

> "Teeth cleaning of animals is a preventive dental procedure, including but not limited to, the removal of explorer-detectable calculus, soft deposits, plaque, stains and the smoothing of unattached tooth services. These procedures are not exclusively cosmetic in nature.

> Their objective is the creation of an environment in which hard and soft tissues of the animal can be maintained in good health, preventing tooth and gum disease.
>
> "Such preventive dental procedures fall squarely within the parameters of Business and Professions Code Section 4826 on several grounds. Such procedures constitute a 'treatment of whatever nature for the prevention . . . of . . . disease of animals' pursuant to subsection (b) as well as 'dental operation upon an animal' pursuant to subsection (d). Additionally, the representation by an individual that he or she is engaged in such preventive dental procedures would violate subsection (a)." [Emphasis added.]

Government Code section 11342, subdivision (b) defines "regulation" as

> ". . . every rule, . . . or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, . . ." [Emphasis added.]

For the following reasons, we find that the challenged policy statement is a "regulation" in that it interprets or makes specific Business and Professions Code section 4826 (quoted above under the subheading "Background"), which defines veterinary "practice."

The Board argues that the policy statement does not interpret or make specific section 4826, but merely restates existing law--the Board argues that the terms "dentistry" or "dental operation" have been sufficiently defined by the Legislature or courts.

The term "dentistry" is defined by the Legislature in a different statute in the Dental Practice Act, Business and Professions Code section 1625, as

> "the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malpositions of the human teeth, . . . gums, . . . or associated structures; . . . . Without limiting the foregoing, a person practices dentistry within the meaning of this [Dental Practice Act] who does any one or more of the following:
>
> ". . . .

> "(b) Performs . . . an operation . . . of any kind, or treats diseases or lesions of the human teeth, . . . gums, . . . or associated structures. . . ."
>
> [Emphasis added.]

The Board further asserts that "operation," as it is used in the Dental Practice Act, has been judicially defined in Whetstone v. Board of Dental Examiners[43] as:

> "It does not require the performance of a surgical operation to bring one within the purview of the law. The word 'operate' or 'operation,' technically used in connection with surgery, mean 'to perform some manual act upon the body of the patient, usually with instruments, with a view to restore soundness or health, or otherwise improve the physical condition,' and 'the act or series of acts and manipulations performed upon a patient's body, as in setting a bone, amputating a limb, extracting a tooth, etc. (Century Dictionary.)"[44]

The Whetstone court found that

> "Where upon instruments are used in the removal of any accumulations upon the teeth, . . . where paste is placed upon the teeth as part of such treatment and thereafter removed by a revolving brush, propelled by a power not stated, which is used in removing the paste and as a part of the process of cleaning them or as a part of the treatment, we think a charge of practicing dentistry as defined by the Dental Act has been made out . . . ." [Emphasis added.]

We are not persuaded by these arguments made by the Board. Business and Professions Code section 1625 and Whetstone define "dentistry" and "operation" as it relates to the Dental Practice Act (which governs "human" dentistry), and not the Veterinary Practice Act. The fact that a word is common to two statutes does not mean that a decision construing it in one statute must control in the construction of the other.[45]

When a statute is written as generally as Business and Professions Code section 1625 (of the Dental Practice Act) and section 4826 (of the Veterinary Practice Act), it is often necessary to supplement the statutes with definitions or other interpretive statements. The fact that it required a published appellate decision to establish that the cleaning of human teeth constituted the practice of dentistry, as defined by the Dental Practice Act, is an indication that the statute required authoritative interpretation.[46]

As we have seen by the evidence submitted during this determination proceeding, Business and Professions Code section

4826 has itself been interpreted three different ways: one judicially and two administratively.

First, the Board's policy statement (the challenged rule) broadly interprets section 4826:

> "Teeth cleaning of animals is a preventive dental procedure, including but not limited to, the removal of explorer-detectable calculus, soft deposits, plaque, stains and the smoothing of unattached tooth services. . . .
>
> "Such preventive dental procedures fall squarely within the parameters of Business and Professions Code section 4826 . . . ."

Second, the Board's proposed regulation (Title 16, CCR, section 2037, quoted in full above under the subheading "Background"), provides a more narrow interpretation of section 4826. It defines the term "dental operation," and carves out some exceptions:

> (b) Nothing in this regulation shall prohibit, however, any person from utilizing cotton swabs, gauze, dental floss, dentifrice, toothbrushes or similar items to clean an animal's teeth."

Additionally, the notice of proposed action and the initial statement of reasons, submitted with the Board's notice to OAL for publication on March 25, 1988, clearly shows that the Board is aware of the need for further interpretation of section 4826. In the "Informative Digest" part of the notice, the Board states "Existing regulations do not define what constitutes a dental operation upon an animal. This regulatory proposal would define dental operation for purposes of veterinary medicine . . . ." In the initial statement of reasons, the Board states, under the heading "Specific Purpose of Regulation," that "Section 4826(d) of the California Practice Act refers to 'dental operation.' This term needs to be clarified and defined. These proposed regulations would provide clarification." (Emphasis added.)

In the Initial Statement of Reasons, under "Factual Basis," the Board states: "The field of animal dentistry is rapidly expanding in California. This creates the need to clarify and define the term 'dental operation' with respect to veterinary medicine and animal dentistry." (Emphasis added.)

Third, the San Joaquin County Superior Court interpreted the statute in yet another way (see preliminary injunction order quoted in full above, under the subheading "Background"). The court prohibited a non-veterinarian "from using the cavitron device to clean animals' teeth," but allowed "manual scaling devices as long as those devices are not used between

the gum and tooth areas," and the use of "toothbrushes, gauze sponges, cotton swabs and dentifrices in cleaning animals' teeth." The court also required that the non-veterinarian "inform the customers that the surface of the teeth under the gums were not cleaned."

The first interpretation banned groomers from undertaking "teeth cleaning of animals," which was defined as including all "preventive dental procedures" used to clean teeth, conceivably including the use of brushes, gauze, toothpaste, etc. The second interpretation explicitly permitted the use of brushes, etc.--something probably banned by the first interpretation, or at least thereby placed in legal doubt. The third interpretation not only permitted the use of brushes, etc., but also of manual scaling devices. This appears to be the interpretation espoused by the groomer community and accepted by the Director of Consumer Affairs. Also, we note that the Alexander court apparently rejected a fourth interpretation--that groomers could freely use ultrasonic dental scaling machines. The San Joaquin County District Attorney, however, declined to prosecute Patti Alexander for violation of the Veterinary Practice Act, under the belief that the statute did not preclude groomers from using ultrasonic dental scaling machines (apparently accepting the fourth interpretation) as long as an anesthetic was not being administered and a scaling device was not being used below the gumline.[47]

Absent either an authoritative appellate decision or unmistakable evidence of legislative intent[48] to outlaw "cosmetic" animal tooth cleaning, we conclude that the Board cannot --without going through the public notice and comment process required by the APA--flatly prohibit groomers from cleaning the exposed surfaces of animal teeth. Indeed, hotly contested issues such as this one are best resolved by giving careful consideration to all legitimate public concerns, and drafting regulations which accommodate these concerns as much as possible. For example, if the Board were to conclude--following the Alexander court--that cosmetic cleaning could be performed only if certain disclosures were made to consumers, the Board could require groomers to obtain from consumers a signed consent form which fully disclosed the medical risks of the purely cosmetic procedure.

Based on the above analysis, we find that the challenged policy statement issued by the Board interprets Business and Professions Code section 4826.

The challenged policy statement also makes specific section 4826, subdivisions (b), (c) and (d), which provides that if anyone performs the functions described in subdivisions (b), (c) or (d) then that person is considered practicing veterinary medicine, surgery or dentistry:

"(b) Diagnoses or prescribes a . . . treatment of whatever nature for the prevention of a . . . disease of animals.

"(c) Administers a . . . treatment of whatever nature for the prevention . . . of a . . . disease of animals, . . ."

"(d) Performs a . . . dental operation upon an animal." [Emphasis added.]

The challenged rule makes specific that the "treatment of whatever nature for the prevention of a disease of animals" includes "teeth cleaning" by stating that "teeth cleaning of animals is a preventive dental procedure" (emphasis added) and as such, falls "squarely within the parameters of Business and Professions Code section 4826." In the challenged policy statement the Board declares that

"[Teeth cleaning] procedures constitute a 'treatment of whatever nature for the prevention . . . of disease of animals' pursuant to subsection (b) as well as 'dental operation upon an animal' pursuant to subsection (d)." [Emphasis added.]

WE THEREFORE CONCLUDE THAT THE CHALLENGED POLICY STATEMENT IS A "REGULATION" AND THEREFORE IS SUBJECT TO THE REQUIREMENTS OF THE APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.[49]

In this proceeding, the Board argues that, even if the policy statement is "regulatory," the policy statement is exempt under Government Code section 11343, subdivision (a)(3). Section 11343, subdivision (a)(3) provides in part:

"Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which :

. . . .

(3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." [Emphasis added.]

The two prongs of section 11343, subdivision (a)(3) must be met before this exemption would apply. The two prongs are:

1. Whether there is a specifically named person or group of persons, and

2. Whether the challenged rule does not apply generally throughout the state.

The challenged policy statement issued by the Board affects, at a minimum, all non-veterinarians who clean animals' teeth, unless they are statutorily permitted or exempted. The argument that the policy statement has only been issued to a limited number of persons who have made an inquiry or who have come to the Board's attention as possible violators of Business and Professions Code section 4826, does not make them "specifically named person[s] or a group of persons." Though individual members of this group may be identified, the group is nonetheless an "open class"[50] whose individual members are affected by the challenged policy statement.[51]

In our analysis, under the heading "II. DISPOSITIVE ISSUES," we have already concluded that the challenged policy statement applies generally statewide; hence, we find that the Board's policy statement does not meet either of the two prongs as set out above.

We therefore conclude that none of the recognized exceptions (set out in note 49) apply to the Board's policy statement.

III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's policy statement that the cleaning of animals' teeth falls within the definition of veterinary practice as set forth in Business and Professions Code section 4826, (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

DATE: July 25, 1989

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1 This Request for Determination was filed by Stephen Arian, Attorney at Law, Wood Island, Victoria Station Bldg., 80 E. Sir Francis Drake Blvd., Suite 3E, Larkspur, CA 94939, (415) 461-3010. The Board of Examiners in Veterinary Medicine was represented by Gary K. Hill, Executive Officer, Board of Examiners in Veterinary Medicine, 1420 Howe Avenue, Suite 6, Sacramento, CA 95825, (916) 920-7662, and Donald Chang, Staff Counsel, Department of Consumer Affairs, 1020 "N" Street, Sacramento, CA 95814, (916) 322-5252.

To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "395" rather than "1."

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

> Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens --California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license

revocation context); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court ordered Department of Health Services to comply with statute directing the establishment of subacute care program in health facilities and the adoption of regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (1989) 257 Cal.Rptr. 450 (mandate is proper remedy to require the Department of Health Services to adopt statutorily-mandated regulations regarding temporary operation of long-term health care facilities); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit $38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); and Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which im-

plemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations' State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty. Gen. 174, 176 (1977) (policy of permitting part-time

faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); and Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

3 Title 1, California Code of Regulations (CCR) (formerly known as California Administrative Code), section 121, subsection (a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the

guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation[']as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

[5] As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California

Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

By the end of the public comment period on May 30, 1989, over 300 comments were submitted to OAL. Almost all of these comments were from individual veterinarians, with the remaining comments from animal health technicians, or associations of either group. All of these comments supported the Board's policy statement that the procedure for cleaning animals' teeth comes within the definition of veterinary practice. No comments were received opposing the Board's policy statement. Each comment that met the requirements of Title 1, CCR, section 124, was considered in this determination proceeding.

The Board submitted a Response to the Request for Determination on June 12, 1989, which was considered in this determination proceeding.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of

statute.)

8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for $3.00.

10 Statutes 1937, chapter 933, page 2567.

11 Business and Professions Code section 101.6 states

> "The boards . . . in the department [Department of Consumer Affairs] are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California.
>
> "To this end, they establish minimum qualifications and levels of competency and license persons desiring to engage in the occupations they regulate upon determining that such persons possess the requisite skills and qualifications necessary to provide safe and effective services to the public, or register or otherwise certify persons in order to identify practitioners and ensure performance according to set and accepted professional standards. They provide a means for redress of grievances by investigating allegations of unprofessional conduct, incompetence, fraudulent action, or unlawful activity brought to their attention by members of the public and institute disciplinary action against persons licensed or registered under the provisions of this [Business and Professions] code when such action is warranted. In addition, they conduct periodic checks of licensees, registrants, or otherwise certified persons in order to ensure compliance with the relevant sections of this [Business and Professions] code.

[12] Statutes 1971, chapter 716, page 1404.

[13] Business and Professions Code section 4808.

[14] Id., section 4809.5.

[15] Id., section 4809.6.

[16] See Business and Professions Code sections 4875 and 4883.

[17] We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude

that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

18 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

19 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

20 Additionally, in the Superior Court case of Alexander v. State of California (see note 23, infra), one groomer's declaration stated that many veterinarians refer clients to her for the purpose of having the animal's teeth cleaned; that one veterinarian came to observe her while she was cleaning an animal's teeth without anesthesia to learn her cleaning techniques; but, the veterinarian still refers clients to her because the veterinarian does not have the time to provide this special service. This groomer further stated that veterinarians have asked her to perform the service of teeth cleaning through their animal hospitals, but she declined "because the additional cost to my customers would be dishonest and prohibitive for the same service I currently provide for approximately half the cost." See declaration of Cindy Collins, of Canine Care, Costa Mesa, CA, dated March 2, 1988, submitted to the court in support of plaintiff's application for preliminary injunction and in opposition to cross-complainants' application for temporary restraining order and preliminary injunction.

21 See Request for Determination, Exhibits B through D:

Exhibit B - letter addressed to Patti Alexander, dated December 10, 1987

Exhibit C - letter addressed to Michael D. Small, Esq.,

dated November 18, 1987

Exhibit D - letter addressed to Jessie Blattel, Esq., dated June 30, 1987.

These letters are substantively identical.

22 Request for Determination, p. 2.

23 Alexander v. State of California (Super. Ct. San Joaquin County, 1988, No. 205626).

24 Register 88, No. 13-Z, pp. 983-985 (OAL Notice No. Z 88-0314-03, filed March 14, 1988).

25 The publication of the proposed regulation was in keeping with the Board's 1989 rulemaking calendar. See California Regulatory Notice Register, No. 15-Z, April 14, 1989, p. 222, which provides the following proposed calendar: Notice - 3/14/88; Hearing - 5/13/88; Adoption - 10/28/88; and To OAL - 3/10/89.

26 See note 21, supra.

27 See Business and Professions Code section 313.1, subdivision (b), which states in part: "The director shall have the authority, for a period of 30 days after the proposed rule, regulation or fee change has been submitted to him or her, to disapprove it on the ground that it is injurious to the public health, safety, or welfare. . . ."

28 Several public comments received during this determination proceeding made reference to or quoted from this veto letter written by the Director. For example, see the attachment to public comment no. 154 from Dr. Rene' Gandolfi, D.V.M. (letter dated May 1, 1988, written by Dr. Gandolfi to Governor Deukmejian) and public comment no. 26 from the Alameda County Animal Health Technicians Association.

29 See the attachment (from the Southern California Veterinary Medical Association titled "Dental Fact Sheet and Update") to public comment no. 265, submitted by Dr. Maurice Lee, D.V.M., dated May 22, 1989.

30 See public comment no. 150, submitted by the California Veterinary Medical Association.

31 Register 89, No. 17-Z, p. 1223.

32 The Response was submitted by the Department of Consumer Affairs Legal Office on behalf of the Board.

33 Government Code section 11343, subdivision (a)(3).

34 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

35 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 127 Cal.Rptr. 552.

36 See Business and Professions Code section 4826, subdivision (c), which permits the administration of a drug, medicine, appliance or treatment of whatever nature for the prevention, cure or relief of a wound, fracture, or bodily injury or disease of animals by an animal health technician or an unregistered assistant at the direction of and under the direct supervision of a licensed veterinarian.

37 Request for Determination, Exhibit D, p. 2.

38 Id.

39 There are non-veterinarians who would not be affected by the challenged policy because they are statutorily exempt. Business and Professions Code section 4827 states that

> "Nothing in this chapter [chapter 11 "Veterinary Medicine"] prohibits any person from:
>
> "(a) Practicing veterinary medicine upon his own animals.
>
> "(b) Being assisted in such practice by his employees

when employed in the conduct of such person's business.

"(c) Being assisted in such practice by some other person gratuitously.

". . . ."

40 (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104.

41 Id., 33 Cal.3d at p. 168, 188 Cal.Rptr. at p. 110.

42 See also 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63; typewritten version, pp. 13-15.

43 (1927) 87 Cal.App. 156.

44 Id., 87 Cal.App. at 163, quoting Jacobs v. Board of Dental Examiners (1922) 189 Cal. 709, 714. In Jacobs, the California Supreme Court found that making a plaster cast of a patient's mouth to measure it for a plate, taking a "wax bite," and putting a wax plate set with teeth in a patient's mouth for a fitting, constituted practicing dentistry within the meaning of the Dental Practice Act.

45 Russ-Field Corp. v. Underwriters at Lloyd's (1958) 164 Cal.App.2d 83, 96.

46 Business and Professions Code section 1625 has been further interpreted to include, as the "practice of dentistry," the making of impressions of the mouth for dental plates (Smulson v. Board of Dental Examiners (1941) 47 Cal.App.2d 584), and operations necessary to take impressions for artificial teeth and the fitting of the artificial teeth (Winning v. Board of Dental Examiners (1931) 114 Cal.App. 658), as well as making a plaster cast of a patient's mouth to measure it for a plate, etc. (see Jacobs, supra, note 44).

47 See Wright, Groomer Won't Be Prosecuted, (Feb. 9, 1988) The Stockton Record, at pp. B-1 and B-8, filed as Exhibit E to the Complaint for Damages in the Superior Court case of Alexander v. State of California, (Super. Ct. San Joaquin County, 1988, No. 205626).

48 Our legislative intent research at the California State Archives produced no evidence that the legislaturers intended to include within the definition of "veterinary practice" the mere cleaning of animals' teeth.

49 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353

("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

50 See Faulkner v. California Toll Bridge Authority, supra, note 34, pp. 323-324.

51 See 1987 OAL Determination No. 7 (State Labor Commissioner, May 27, 1987, Docket No. 86-013), California Administrative Notice Register 87, No. 24-Z, June 12, 1987, pp. B-53--B-54, typewritten version, p. 13; and 1987 OAL Determination No. 9 (Department of Corporations, June 30, 1987, Docket No. 86-015), California Administrative Notice Register 87, No. 29-Z, July 17, 1987, pp. B-40--B-41, typewritten version, pp. 14-15.

52 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.